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In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY FRANCIS CATERINE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HERBERT MIKELBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that 15 U.S.C. 1644 is unconstitutionally vague; that the trial court erroneously defined the term "transaction" in its instructions to the jury; that the evidence was insufficient to sustain petitioners' convictions; that the trial court erred in permitting a government witness to be excused without being subject to cross-examination; that the prosecutor made improper comments during closing argument; and that the court abused its discretion in sentencing petitioners.

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of conspiring to use fraudulently obtained credit cards, in violation of 15 U.S.C. 1644 (count 1), and of aiding and abetting the use of fraudulently obtained credit cards, in violation of 15 U.S.C. 1644 and 18 U.S.C. 2 (counts 3 and 4). On counts 1 and 3, petitioner Caterine was sentenced to concurrent terms of two years' imprisonment and was fined $5,000; on count 4, he was placed on three years' probation, to be served consecutively to the sentences imposed on counts 1 and 3, and was fined $5,000. Petitioner Mikelberg was sentenced to concurrent terms of 18 months' imprisonment on counts 1 and 3 and was placed on four years' probation on count 4, to be served consecutively to the sentences imposed on counts 1 and 3. The court of appeals affirmed. 517 F. 2d 246.

Petitioners and others participated in a highly organized scheme to use fraudulently obtained credit cards to purchase hundreds of thousands of dollars worth of items, principally airline tickets that they resold at half price. Two of petitioners' co-conspirators, Lester Ray Henderson and William A. Davis, each pleaded guilty to one cour' of the indictment and testified for the government at petitioners' trial.[1]

Henderson testified that he charged numerous airline tickets on fraudulently obtained credit cards. Prior to making the purchases, Henderson would meet with Caterine and sometimes Mikelberg (A. 383, 385, 391, 395, 413, 420, 428)[2] to obtain the names of the persons for whom

[1]Rita Kenner and Richard W. Payne were also named as co-conspirators in count 1 but were not named as defendants.

[2]"A." refers to the appendix filed in the court of appeals.

the tickets should be purchased (A. 387, 395, 396, 414, 428). During one of his meetings with Caterine, Henderson said that he was going to apply for credit under the name of Clinton R. Pittman (A. 393). Henderson received aid from both Caterine and Mikelberg in obtaining credit cards under this name (A. 392-393, 502-503, 351-352, 391, 425). Henderson charged in excess of $5,000 worth of airline tickets (Govt. Exh. Series 8) on an American Express card issued to Clinton R. Pittman (count 3).[3] These tickets were given to Caterine, who paid Henderson one half their face value (A. 388-389, 410, 428-429).[4] Henderson also used this credit card to charge liquor that he later sold to petitioner Caterine at a 30% discount (A. 429-434).

Co-conspirator Davis testified that he applied for various credit cards in the name of William C. Tucker (A. 162-163) and gave other false information on his applications (A.

[3]Henderson officially changed his name to Clinton Pittman on May 11, 1971 (A. 484). However, he applied for credit cards, including the American Express card involved in count 3, prior to that date (A. 347, 390, 424).

[4]Kathleen Parrish, a former employee of petitioner Caterine, testified that in August 1971 she was present at a conversation in which petitioners, Henderson and Payne discussed the "burning" of credit cards—charging amounts far above the credit limit with no intention of making payment (A. 538-540). They discussed the charging of airline tickets and selling them at half price (A. 544). At that time petitioner Mikelberg said that he had his own plan for using credit cards (A. 543), which he later explained to at least Parrish and Henderson. This plan, which the participants referred to as the "Mikelberg Special" (A. 546), involved taking ten American Express, ten Carte Blanche and ten Diners Club cards, charging $10,000 worth of airline tickets on each card, then taking one card and the pertinent vouchers to the issuing company and trying to sell the company a computer plan whereby it could detect such fraud (A. 545-546). In many respects, the actual scheme was quite similar to this proposal.

165-170). Using names provided by Henderson (A. 315-316),[5] Davis purchased numerous airline tickets with these cards (A. 170-268). Those tickets that Davis did not personally use were turned over to Henderson (A. 267) in return for a percentage of their face value (A. 268). Davis charged $11,482.91 worth of airline tickets on an American Express card issued in his name (A. 247) (count 4) and turned over $9,152.64 worth of these tickets to Henderson (A. 246). Some of these tickets were purchased on a February 1972 trip to Atlanta (A. 264-265), during which petitioner Mikelberg had provided Davis with a list of names of persons for whom he should purchase tickets (A. 266).

1. Petitioners contend (No. 75-652 Pet. 7-8; No. 75-5678 Pet. 8-10) that the term "transaction" in 15 U.S.C. 1644 renders the statute unconstitutionally vague.[6] Petitioners also contend (No. 75-652 Pet. 8-10; No. 75-5678 Pet. 10-14) that the court erred when it instructed the jury that "[t]he term 'a transaction' may include more than one purchase or charge so long as there is a common scheme or design behind those purchases or charges." In this regard petitioners assert that if each presentation of a fraudulent credit card is a "transaction," the government failed to establish any one transaction which met the $5,000 jurisdictional amount of former Section 1644.

[5]Many of the tickets purchased by Davis with his TWA, American Express and American Airlines credit cards listed T. Caterine as the passenger (A. 172-203).

[6]15 U.S.C. 1644 provided that:

> Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating $5,000 or more, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

In 1974, Congress amended Section 1644. Petitioners' fraudulent scheme to purchase airline tickets clearly falls within the terms of the amended statute, which, in relevant part, provides (15 U.S.C. (Supp. IV) 1644(e)):

> Whoever knowingly receives, conceals, uses, sells, or transports in interstate or foreign commerce one or more tickets for interstate or foreign transporation, which (1) within any one-year period have a value aggregating $500 or more, and (2) have been purchased or obtained with one or more counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit cards: * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The court of appeals correctly held, however, that Congress intended a flexible definition of "transaction," see *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610,[7] and that the district court's instruction was proper.[8] Con-

[7]There the Court said:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.

[8]Contrary to petitioner Mikelberg's contention (No. 75-5678 Pet. 11-12), the court's instruction did not transfer to the jury the function of determining the law. The court clearly defined "transaction" and left for the jury the factual determination whether a fraudulent scheme existed.

Petitioner Caterine's reliance (No. 75-652 Pet. 9) upon *United States* v. *Maze*, 414 U.S. 395, and *Blockburger* v. *United States*, 284 U.S. 299, is misplaced. The statute considered in *Maze*, 18 U.S.C. 1341, specifically prohibits each fraudulent use of the mails without any monetary limitation and does not provide for the aggregation of the value of money or property fraudulently obtained. Thus, the Court's decision in *Maze* is not inconsistent with the district court's definition of "transaction." Nor is the district court's definition inconsistent with *Blockburger*, which held that two sales of morphine constituted two separate offenses despite the involvement of the same buyer and seller and the relatively short period of time between each sale. There is no reason why a series of events cannot be viewed as separate transactions for some purposes and a single, interrelated transaction for other purposes; here, for instance, each fraudulent purchase was doubtless a separate offense under state law, but this fact has no logical bearing on whether the series of purchases fall within the ambit of the federal prohibition.

gress clearly meant to prohibit, and the statute plainly forbids, the interstate use of fraudulently obtained credit cards to obtain goods or services, or both, with an aggregate retail value of $5,000 or more. This prohibition is neither vague nor indefinite. Moreover, Congress was aware that a single transaction by credit card rarely exceeds $5,000. The jurisdictional amount was imposed to protect federal courts from an inundation of fraud cases involving small purchases, but the principal limitation of the statute, as the court of appeals properly found (No. 75-652 Pet. App. 13a), is that it confines "the aggregating of purchases only to those purchases made 'in a transaction affecting interstate or foreign commerce.' " If the statute were further limited to single $5,000 credit card purchases, it would be rendered practically useless. Congress could not have intended such a result.[9] See *Government of the Virgin Islands* v. *Hernandez*, 508 F. 2d 712 (C.A. 3), certiorari denied, 422 U.S. 1043.

As thus construed, the term "transaction" is not so devoid of meaning as to render the statute unconstitutionally vague. The statute intelligibly forbids a definite course of conduct: fraudulent purchases of goods or services having a retail value aggregating $5,000 or more. "The fact that Congress might * * * have chosen [and in this case subsequently did choose] 'clearer and more precise language' equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague." *United States* v. *Powell*, No. 74-884, decided December 2, 1975, slip op. 7, quoting *United States* v. *Petrillo*, 332 U.S. 1, 7.

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[9]An accepted statutory rule of construction is that words which employ the singular also include the plural. 1 U.S.C. 1; see, *e.g.*, *Barr* v. *United States*, 324 U.S. 83. To be consistent with the statutory provision that 15 U.S.C. 1644 permits an aggregation of the retail value of the goods and services fraudulently obtained, "transaction" must include a common scheme of fraudulent purchases.

2. Petitioners also contend (No. 75-652 Pet. 10-11; No. 75-5678 Pet. 14-20) that there was insufficient evidence to show that they knew the credit cards had been fraudulently obtained. As set forth above (pp. 2-4), the jury was aware that petitioners had received thousands of dollars worth of airline tickets at half their face value, that petitioners knew that Henderson had applied for credit under a false name, that petitioners had provided names to Henderson and Davis for ticket purchases, that petitioners and Henderson had discussed the "burning" of credit cards, that petitioner Caterine had permitted Henderson to use his business establishments as credit references and to consult his credit card black lists. Viewing this evidence in the light most favorable to the government, see *Glasser* v. *United States*, 315 U.S. 60, 80, the court of appeals correctly concluded that the jury could find beyond a reasonable doubt that petitioners knew the credit cards had been fraudulently obtained. Moreover, the evidence showed that petitioners had conspired to use and had aided and abetted the actual use of these fraudulently obtained cards.

3. Petitioner Caterine contends (No. 75-652 Pet. 6-7) that the district court erred in permitting a witness called by the government to be excused without being subject to cross-examination. Richard Payne, an unindicted co-conspirator, testified for the government before the grand jury prior to the return of the instant indictment. At trial, however, contrary to his grand jury testimony, Payne could not identify petitioner Mikelberg (A. 507) or petitioner Caterine (A. 507-509). The prosecutor gave Payne a transcript of his grand jury testimony, but it failed to refresh his recollection (A. 509-512). The government thereupon claimed surprise and was permitted to impeach the witness (A. 512-515). Payne claimed not only that he could not recall being asked during the grand jury proceeding whether he had a conversation with petitioner Caterine but also that he could

not even recall testifying before the grand jury (A. 515). Since, in the court's judgment, the prosecutor "ha[d] elicited no answers to [his] questions" (A. 515), the court, without objection, permitted Payne to be excused (A. 515).

The district court's action was proper. Since defense counsel did not object, petitioner cannot now complain that he was deprived of his constitutional right to confront adverse witnesses.[10] Moreover, petitioner's right to cross-examination extends only to those witnesses who testify against him. See, *e.g., California* v. *Green,* 399 U.S. 149, 154-165. Petitioner concedes (No. 75-652 Pet. 6) that the government's attempt to elicit testimony from Payne "did not produce evidence directly harmful" to his defense. In addition, the court instructed petitioners that they could call Payne as a witness, but neither did so.

4. Petitioners contend (No. 75-5678 Pet. 21-23)[11] that the prosecutor made improper comments in rebuttal argument. During closing argument, counsel for petitioner Caterine attacked the government's witnesses and charged that the government "should be ashamed to have brought before the

[10]Petitioner Caterine, relying upon *Brookhart* v. *Janis,* 384 U.S. 1, contends (No. 75-652 Pet. 6-7) that counsel could not waive the right to cross-examination. *Brookhart,* however, considered a unique Ohio practice which, if chosen by the defendant, required the state to make only a *prima facie* showing of guilt. (Since Ohio had no statutory plea of *nolo contendere,* this procedure was an attempt to circumvent the collateral effects of a plea of guilty for later civil suits arising out of the same factual situation.) The waiver of cross-examination in these circumstances was, in effect, a plea of guilty, and such a waiver could not be made without the knowledgeable consent of the defendant. Here, the waiver of cross-examination cannot be deemed the equivalent of a guilty plea.

[11]Petitioner Caterine (No. 75-652 Pet. 1-2) has adopted the issues raised by petitioner Mikelberg in his petition for a writ of certiorari.

people of this county such an array of debauched individuals" (A. 965). As a specific example of the alleged weaknesses in the government's case, defense counsel referred to witness Payne and his inability to remember anything (A. 965).

In rebuttal, the prosecutor argued in substance that the government must use "the type of testimony that we have" (A. 967) and that if it could not use testimony from the type of individuals who testified at the instant trial it "would probably be out of the business of prosecuting this type of case" (A. 967). The prosecutor's reference (A. 970) to Payne's inability to remember anything and to the fact that witnesses say one thing and "then when it comes time for trial, things are slightly shaded a different bit [because] * * * [t]hey are scared to death" were merely illustrations of problems encountered by the government in these types of cases. In context, these statements were proper. In any event, petitioners have not shown how they were prejudiced.[12]

The government concluded its rebuttal by stating that the jury could infer from the evidence that petitioners would be involved in crime for the rest of their lives (A. 972). This was a comment upon the evidence, not a statement of belief which implied that the prosecutor possessed some superior knowledge. Even if the comment was improper, the district court's immediate admonition to the jury to disregard it (A. 972) obviated any prejudice. The court did not err in refusing to grant a mistrial. See, *e.g., United States* v. *Hayes,* 444 F. 2d 472 (C.A. 5), certiorari denied, 404 U.S. 882.

[12]Petitioner Mikelberg (No. 75-5678 Pet 23) suggests only that the remarks were prejudicial because the evidence in the case was weak, implying perhaps that petitioner could only have been convicted on the basis of the prosecutor's closing statement. This argument is nothing more than a challenge to the sufficiency of the evidence, which, as we have shown above (p. 7) was clearly adequate to support the conviction.

5. Petitioners finally contend (No. 75-5678 Pet. 24-26) that the district court abused its discretion in sentencing them to imprisonment while Henderson and Davis received probation and fines after pleading guilty to one count of the indictment. Petitioners point to nothing beyond the disparity in sentences, which itself does not show that they were punished for exercising their right to trial by jury. *Hart* v. *Henderson*, 449 F. 2d 183 (C.A. 5). Their assertion that the innocent may be intimidated into pleading guilty by the sentences in this case is unfounded. Petitioners exercised their right to trial, and they were convicted by a jury on the basis of overwhelming evidence. They received sentences well within the statutory limit (see 15 U.S.C. 1644). Under these circumstances, there was no abuse of discretion. See, *e.g.*, *United States* v. *Stidham*, 459 F. 2d 297, 299-300 (C.A. 10), certiorari denied, 409 U.S. 868.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.